

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

RICKEY SIMPSON,

Plaintiff,

v.

Civ. Action No. 2:19-CV-29
(Kleeh)

OCWEN LOAN SERVICING, LLC,
and WELLS FARGO BANK,

Defendants.

MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]

Pending before the Court is a Motion to Remand filed by the Plaintiff, Rickey Simpson ("Plaintiff"). For reasons discussed herein, the Court denies the motion.

I. PROCEDURAL HISTORY

On April 16, 2019, this action was timely removed to this Court from the Circuit Court of Lewis County, West Virginia. ECF No. 1. Plaintiff brings five (5) causes of action against the Defendants, Ocwen Loan Servicing, LLC ("Ocwen"), and Wells Fargo Bank ("Wells Fargo") (together, "Defendants"), related to allegedly abusive loan servicing. See Compl., ECF No 1-1. On April 23, 2019, Defendants filed an Answer. ECF No. 5. On July 9, 2019, Plaintiff filed this motion. ECF No. 14. It is now ripe for consideration.

MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]

II. GOVERNING LAW

When an action is removed from state court, a federal district court must determine whether it has original jurisdiction over the plaintiff's claims. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree[.]" Id. (citations omitted). "Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction." Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994) (citation omitted).

Federal courts have original jurisdiction over two types of cases: those involving federal questions under 28 U.S.C. § 1331 and those involving diversity of citizenship under 28 U.S.C. § 1332. When a party seeks to remove a case based on diversity of citizenship, that party bears the burden of establishing that "the matter in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs, and is between citizens of different states[.]" 28 U.S.C. § 1332.

When a complaint does not contain a specific amount in controversy and the defendant files a notice of removal, "the defendant bears the burden of proving that the claim meets the

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

requisite jurisdictional amount,” and “the Court may consider the entire record” to determine whether that burden was met. Elliott v. Tractor Supply Co., No. 5:14CV88, 2014 WL 4187691, at *2 (N.D.W. Va. Aug. 21, 2014) (citing Mullins v. Harry’s Mobile Homes, Inc., 861 F.Supp. 22, 23 (S.D.W. Va. 1994)). If the defendant sufficiently proves by a preponderance of the evidence that the amount in controversy exceeds \$75,000 and the parties are diverse, then removal is proper. Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 553 (2014). “[A]bsent a binding stipulation signed by [the plaintiff] that he will neither seek nor accept damages in excess of \$75,000, the Court must independently assess whether the defendant[] ha[s] proven by a preponderance of the evidence that [the] . . . complaint seeks damages in excess of \$75,000.” Virden v. Altria Group, Inc., 304 F. Supp. 2d 832, 847 (N.D.W. Va. 2004).

III. THE COMPLAINT

The Complaint alleges abusive loan servicing by Defendants. Plaintiff argues that “Defendants regularly misstated the status of the account, misrepresented that it was permitted to return Plaintiff’s payments and instructed Plaintiff not to make payments, and otherwise interfered with Plaintiff’s performance on the loan.” Compl., ECF No. 1-1, at 1. Ocwen is the servicer

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

of the subject loan. Id. ¶ 2. Wells Fargo is the trustee for the holder of the subject loan. Id. ¶ 3.

On or around March 4, 2005, Plaintiff was placed into an adjustable rate mortgage by H&R Block Mortgage Corporation ("H&R Block") in the amount of \$108,000.00. Id. ¶ 4. Plaintiff argues that Ocwen does not have authority to service the loan because it has no chain of title transferring the loan from H&R Block to Option One and/or from Option One to any subsequent holder. Id. ¶ 8.

Plaintiff asserts that an illegal balloon exists and raises issues regarding refusal of payments. He struggled with loan payments and applied for another modification. Id. ¶¶ 11-19. Ocwen advised Plaintiff that his loan could be modified and instructed Plaintiff not to send in any payments because Ocwen would just return them. Id. ¶ 20. Based on these instructions, Plaintiff refrained from making any payments and sent in additional forms. Id. ¶ 21. Plaintiff alleges that Ocwen has a policy to return payments of customers who are delinquent. Id. ¶ 22. This is, Plaintiff argues, contrary to West Virginia law and increases the amount of borrower delinquencies. Id. On June 28, 2018, Ocwen told Plaintiff that it would not accept any payments short of a full reinstatement if a loan is delinquent. Id. ¶ 23.

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

Plaintiff alleges that Ocwen denied plaintiff's application, the stated reason being that Plaintiff was not permitted to modify his loan more than three times. Id. ¶ 24. Plaintiff also cites facts concerning Ocwen's failure to apply payments to Plaintiff's account, illegal threats, and misrepresentations of amounts due.

Plaintiff sent Ocwen several notices of its right to cure its legal errors, advising Ocwen of its improper servicing and requesting related documentation. Id. ¶¶ 50, 51. Ocwen did not offer to cure or rectify its conduct, and it did not provide the requested documentation. Id. ¶¶ 52, 53. Plaintiff argues that Ocwen's conduct was not consistent with commercially reasonable business practices, as set forth in applicable legal requirements, binding consent orders, and other indications of industry standards. Id. ¶ 54. Plaintiff argues that he has been damaged.

Plaintiff asserts the following causes of action:

- (I) Misrepresentation, in violation of section 46A-2-127 of the West Virginia Code;¹

¹ For this Count, Plaintiff seeks (a) civil penalties for each violation, (b) reasonable attorney fees and costs, (c) actual damages, and (d) such other relief as the Court deems equitable and just.

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

- (II) Refusal to Apply Payments, in violation of sections 46A-2-115 and 46A-2-128 of the West Virginia Code;²
- (III) Unconscionable Debt Collection, in violation of section 46A-2-128 of the West Virginia Code;³
- (IV) Fraud;⁴ and
- (V) Tortious Interference with Contract (Servicer).⁵

IV. DISCUSSION

The Court finds that Defendants have demonstrated certainly by a preponderance of the evidence and perhaps even more that over \$75,000 is at issue. Under section 46A-5-101(1) of the West Virginia Code, if a creditor or debt collector violates the provisions of that chapter, the consumer has the right to recover a penalty of \$1,000 per violation. Plaintiff alleged in

² For this Count, Plaintiff seeks (a) civil penalties for each violation, (b) reasonable attorney fees and costs, (c) actual damages, and (d) such other relief as the Court deems equitable and just.

³ For this Count, Plaintiff seeks (a) civil penalties for each violation, (b) reasonable attorney fees and costs, (c) actual damages, and (d) such other relief as the Court deems equitable and just.

⁴ For this Count, Plaintiff seeks (a) actual damages, (b) punitive damages, (c) reasonable attorney's fees and costs of this litigation, and (d) such other relief as the Court deems equitable and just.

⁵ For this Count, Plaintiff seeks (a) actual damages, (b) punitive damages and reasonable attorney fees and the costs of this litigation, and (c) such other relief as this Court deems equitable and just.

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

his Complaint that Ocwen does not have the authority to service the loan. See Compl., ECF No. 1-1, at ¶ 8. Under this theory, Ocwen would have been “misrepresenting the ownership and authority to service the account,” in violation of section 46A-2-127 of the West Virginia Code. Every attempted collection by Ocwen would be a violation of the West Virginia Consumer Credit and Protection Act (“WVCCPA”) and potentially create \$1,000.00 in statutory damages. Adjusted for inflation, each attempted collection would be valued, for purposes of damages, at \$1,080.69. As Ocwen points out, there were 72 monthly billing statements⁶ from March 2013 to April 2019, which creates an amount in controversy of at least \$72,000 – and \$77,809.68 when adjusted for inflation. Plaintiff alleges other statutory violations as well: placement of payments in “suspense account[s],” and “send[ing] Plaintiff correspondence that

⁶ In his Motion for Remand, Plaintiff argued that Defendants had failed to produce evidence of these billing statements. See ECF No. 20 at 9 (writing that Defendants “do not include the dates of these statements or any record that would establish the accuracy of this number, nor do Defendants provide any evidence that establishes why each of these monthly billing statements would be alleged as violations of the WVCCP by Plaintiff”). Ocwen attached the billing statements to its Response. As discussed above, the Court may consider the entire record in determining the amount in controversy. See Elliott, 2014 WL 4187691, at *2.

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

misrepresents the amounts that Plaintiff[] owes to Defendant." Compl., ECF No. 1-1, at ¶ 34.

Plaintiff's claim for Fraud at Count IV and Tortious Interference at Count V and his pursuit of punitive damages for each warrants additional discussion. "A good faith claim for punitive damages may augment compensatory damages in determining the amount in controversy unless it can be said to a legal certainty that plaintiff cannot recover punitive damages in the action." Hicks v. Herbert, 122 F. Supp. 2d 699, 701 (S.D.W. Va. 2000) (citation omitted). West Virginia law permits recovery of punitive damages where clear and convincing evidence demonstrates "the defendant [acted] with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." W. Va. Code § 55-7-29(a). The West Virginia Legislature has limited the recovery of punitive damage awards within the state - "[t]he amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or \$500,000, whichever is greater." Id. Despite these caps, a request for punitive damages certainly looms large in assessing whether the jurisdictional amount in controversy is satisfied. "[A] request for punitive damages, where properly recoverable, inevitably inflates a plaintiff's

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

potential recovery.” Bryant v. Wal-Mart Stores E., Inc., 117 F. Supp. 2d 555, 556 (S.D.W. Va. 2000). Punitive damages are an available element of recovery in actions for fraud. See, e.g., Kessell v. Leavitt, 511 S.E.2d 720 (W. Va. 1998) (affirming award of punitive damages on fraud claim). West Virginia has likewise affirmed punitive damages awards for tort claims alleging intentional interference with business relationships. See, e.g., C.W. Dev., Inc. v. Structures, Inc. of W. Va., 408 S.E.2d 41, 45 (W. Va. 1991). Thus, punitive damages appear “properly recoverable” based on the allegations in the Complaint and, therefore, must be considered at this stage.

Defendants also point to a prior settlement demand in support of its assertion the amount in controversy is satisfied here. With leave of court, Defendants submitted, under seal, an email from Plaintiff’s counsel outlining a settlement demand. This Court has previously found settlement discussions germane to the issue present here. See Gillis v. Bayview Loan Servicing, LLC, No. 2:18-CV-57, 2018 WL 4183255 (N.D.W. Va. Aug. 15, 2018); see also Grinell Mut. Reinsurance Co. v. Haight, 697 F.3d 582, 585 (7th Cir. 2012) (“Although settlement negotiations are not admissible at trial pursuant to Federal Rule of Evidence 408 to prove liability for or invalidity of the claim or its amount,

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

they can be considered 'to show the stakes' when determining whether the amount in controversy is met.").

Plaintiff, in his Motion to Remand, claims he does not seek discharge of the loan in question. However, the very first term demanded in Plaintiff's settlement correspondence was "paying off the balance of the loan." ECF No. 40-1 at 7. The relevant documents demonstrating the monetary value of that proposed settlement term were submitted under seal [ECF No. 4-1 at 9-12] and the Court will not repeat them here. However, it is abundantly clear that the value of "paying off the loan" is more than sufficient to satisfy the amount in controversy here before consideration of other terms of the settlement proposal or other damages recoverable. The settlement demand went on to request attorney fees incurred to date (approximately \$36,000) and payment of cash to "cover" the tax consequences of satisfaction of the loan [ECF No. 4-1 at 7]. Simply put, the "stakes" are well in excess of the \$75,000 threshold whether the possible recovery under the WVCCPA or the settlement proposal is considered.

Taking into account the \$77,809.68 in potential statutory damages discussed above, in addition to the numerous other

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

alleged statutory violations, the claim for attorney's fees,⁷ the claim for actual damages, the claim for punitive damages, and the sealed information at ECF No. 40-1 at 7, the record leaves no doubt that over \$75,000.00 is in dispute in this case. If Plaintiff found federal jurisdiction so abhorrent, he could have easily avoided it. A simple stipulation in the Complaint that he was seeking less than and would not accept more than \$75,000 would, of course, suffice. Plaintiff possibly could have filed a post-removal stipulation "clarifying" the ambiguity of the amount sought. See, e.g., Stanley v. Auto-Owners Ins. Co., No. 3:19-cv-02264-JMC, 2019 WL 5303726, at *2 (D.S.C. Oct. 21, 2019) (noting that a post-removal clarification of an ambiguous complaint as opposed to a formal amendment may be considered in

⁷ Without estimating a specific amount, the Court finds that attorney's fees may be considered when determining the amount in controversy. See Barnikowski v. NVR, INC., 307 F. App'x 730, 736 n.12 (4th Cir. 2009) (writing that when a "statute provides for the recovery of attorneys' fees as a substantive right, they are properly includable in the amount in controversy estimate"). Attorney fees are recoverable under the WVCCPA. See W. Va. Code § 46A-5-104 ("In any claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may award all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer. On a finding by the court that a claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice was brought in bad faith and for the purposes of harassment, the court may award to the defendant reasonable attorney fees.").

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO REMAND [ECF NO. 14]**

assessing the amount in controversy only if the jurisdictional question was unclear at the time of removal). He did neither. Instead, a settlement proposal was made post-removal which clearly satisfied the amount in controversy even though the Complaint itself left little question. After applying common sense and reviewing the entire record, the Court finds that Defendants have met their burden, and the Motion to Remand is denied.

V. CONCLUSION

For the reasons discussed above, the Motion to Remand is **DENIED** [ECF No. 14].

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Memorandum Opinion and Order to counsel of record.

DATED: March 9, 2020



THOMAS S. KLEEH
UNITED STATES DISTRICT JUDGE